

**IN THE COURT OF APPEALS OF IOWA**

No. 3-1139 / 12-2004  
Filed January 9, 2014

**CHRIS MOORE,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Scott County, Joel W. Barrows,  
Judge.

Applicant Chris Moore appeals from a ruling entered September 20, 2012  
denying his request for postconviction relief. **AFFIRMED.**

Jack E. Dusthimer, Davenport, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney  
General, and Michael J. Walton, County Attorney, for appellee State.

Considered by Vogel, P.J., and Mullins, J., and Goodhue, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

**GOODHUE, S.J.**

Applicant Chris Moore appeals from a ruling entered September 20, 2012, denying his request for postconviction relief. On appeal Moore raises only two issues: (1) whether he received ineffective assistance of counsel based on counsel's failure to request a mistrial after the alleged victim offered a vindictive, nonresponsive answer to a question asked by his counsel; and (2) whether he was denied a fair trial under the totality of the circumstances.

**I. Background Facts and Proceedings**

Moore was convicted by jury trial on April 21, 2009, of willful injury with bodily injury and domestic assault with a weapon. He was sentenced on May 21, 2009. A notice of appeal was filed by Moore's counsel, but the State Appellate Defender's office filed a motion for leave to withdraw. After an independent review of the record, a supreme court panel found the appeal to be frivolous and ordered a dismissal.

The criminal charges were predicated on Moore's alleged attack with a fork and knife on a woman he had been living with. The attack resulted in several wounds. After Moore's arrest, the victim sent him a letter that was of a forgiving nature and indicated a desire to continue their relationship. Apparently, Moore attempted to fashion a defense by use of the letters received from the victim.

Moore filed a pro se application for postconviction relief on May 15, 2010. Hearing was held and relief was denied. Moore has appealed.

Moore's pro se application was a multifaceted and diffuse document and attempted to raise multiple issues. The trial court's ruling and order was an

exhaustive and comprehensive document addressing each issue Moore attempted to raise. On appeal, the issues raised have been narrowed to the two stated above.

Moore's claims rest on the victim's response to a question asked of her on cross-examination which sought an answer as to why she had written a letter after Moore's arrest seeking a continued relationship with him. She stated,

Yes, I had my own reason. He stabbed me and he tried to kill me. I don't care. I could write him a thousand letters. He tried to kill me, I wish him to burn in hell. Yes, I wrote it. He was calling me. There ain't nothing going to take that back. That is a bad man, he needs to burn in hell for what he did. He's been doing this all his life.

The court responded, "Just make sure you try to remain calm, considering your medical conditions and just answer the questions by Mr. Ingham." The victim responded, "I'm sorry, your honor." Moore's counsel made no objection or motion based on the victim's diatribe.

## **II. Error Preservation**

The State concedes that error was preserved as to the first issue, but contends that violation of Moore's due process rights guaranteeing a fair trial, stated as the second issue, was not at issue before the district court. The second issue raises no specific claim of error, but is a conclusion based on the first claim and will be considered in that light. The issue of a fair trial is always present in any claim of ineffective assistance of counsel. Moore includes an argument that a fair trial did not result because of the cumulative effect of unspecified multiple errors.

### III. Scope of Review

Ineffective-assistance-of-counsel claims in a postconviction relief proceeding are a statutory right, but because of their constitutional nature, are reviewed de novo. *Lado v. State*, 804 N.W.2d 248, 250 (Iowa 2011).

### IV. Discussion

To prevail on an ineffective-assistance-of-counsel claim, Moore must establish by a preponderance of the evidence both that counsel failed to perform an essential duty and prejudice resulted. See *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). There is a presumption counsel performed competently. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). Moore correctly contends that a fair trial is a basic requirement of constitutional due process. See *State v. Larmond*, 244 N.W.2d 233, 235 (Iowa 1976). He then asserts that the victim's statements, as cited above, prevented him from having a fair trial and that counsel's failure to move for a mistrial constitutes ineffective assistance of counsel.

The victim's vindictive statements may have invited prejudice in the jury, but she was the victim, and the statement consisted in part of a recitation of what happened from her perspective. Based on the factual situation narrated by the victim witness, an attitude of vindictiveness is not surprising or unusual. Moore, through use of the letter, was trying to convey an impression that all was well with the victim, and she had forgiven him and wanted to continue the relationship. The victim clarified her attitude in no uncertain terms. While perhaps she could have done so in a less offensive and kinder manner, Moore has not directed this court to any authority that suggests an expression of

animosity or vindictiveness by a witness claiming to be a victim constitutes a basis for a mistrial. The witness never directly commented on Moore's guilt, but as the victim of the offense, she stated what had happened and her opinion of Moore. The trial court may have granted a motion to strike a part of her comment as unresponsive or not relevant after proper motion. See *Beeck v. Aquaslide 'N' Dive Corp.*, 350 N.W.2d 149, 170 (Iowa 1984) ("A trial court should strike unresponsive answers on motion of the interrogator."). Motions of mistrial, however, are discretionary with the trial court, and if denied, the burden is on the movant to establish prejudice to the point of denying him or her of a fair trial. *State v. Frei*, 831 N.W.2d 70, 80-81 (Iowa 2013). Moore has not met that burden and could not on the record before the court.

A valid basis to support a mistrial has not been offered, and if such a motion had been made, it would have been denied. Counsel is not ineffective for failing to raise an issue that has no merit. *State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009).

The second issue raised does not direct the court to any specific failure of counsel; rather, Moore's argument contends that in viewing the totality of the circumstances the cumulative effect of counsel's failure constitutes prejudice. On appeal Moore has alleged only one claim of counsel's ineffectiveness, and that claim was denied by the trial court and the denial has been affirmed. Cumulative errors, although not prejudicial themselves, can be considered in order to establish prejudice. *State v. Clay*, 824 N.W.2d 488, 501 (Iowa 2012). Nevertheless, errors that are not unconstitutional individually cannot be added together to create a constitutional violation. *State v. Veal*, 564 N.W.2d 797, 812-

13 (Iowa 1997); *see also Wainwright v. Lockhart*, 80 F.3d 1226, 1233 (8th Cir. 1996). No error has been established, and only one has been claimed; therefore the cumulative error doctrine is not applicable.

**AFFIRMED.**